MOTION FILED
FEB - 1 1985

No. 84-468 (16)

Office - Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,
Petitioners,

VS.

CLEBURNE LIVING CENTER, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND IN SUPPORT OF RESPONDENT

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January, 1985

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CITY OF CLEBURNE, TEXAS, et al.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Amicus respectfully moves this Court for an order granting leave to file a brief amicus curiae in this case pursuant to Rule 36 of the Supreme Court Rules. Consent of the attorneys for Respondent has been obtained. Consent of the attorneys for Petitioner has been refused.

Interest of Amicus Curiae

Disability Rights Education and Defense Fund (DREDF) is a national disability civil rights organization dedicated to securing equal citizenship for disabled Americans. Established in 1979, in the tradition of other legal defense funds representing other minorities and women, DREDF pursues its mission through education, advocacy and law reform efforts. From its inception, DREDF's primary purpose has been to include disability within the civil rights arena by demonstrating the connection between disability-based discrimination and discrimination based on race and gender. Critical to this effort has been the establishment of close working relationships with the NAACP Legal Defense Fund, Inc.[1], the

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[1]DREDF and the NAACP Legal Defense Fund have worked together on two disability cases recently decided by this Court. Consolidated

Women's Legal Defense Fund and others representing disadvantaged and disenfranchised people. It is in this vain that the enclosed brief focuses on the close historical interrelationship between racial prejudice and stereotypes about retardation. The perspective presented in the brief is not presented by the respondent or other amici.

DREDF has a direct interest in this case. DREDF has represented and/or assisted hundreds of disabled people who have been excluded from opportunities because of the false and demeaning stereotypes present in this case. Furthermore, DREDF's efforts to promote the full integration of disabled citizens into the American mainstream would be wholly undermined if the type of exclusionary zoning present in this case were

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Rail Corp. v. Darrone 465 U.S.--(1984); Choate v. Alexander, 53 U.S.L.W. 4072 (January 8, 1985)

allowed to stand. Hence, DREDF's clients will be directly affected by the outcome of this case.

For these reasons, this Motion For Leave to File a Brief as Amicus Curiae should be granted.

Respectfully submitted,

Arlene Brynne Mayerson

Arlene Brynne Mayerson
Counsel for Amicus Curiae

Dated: February 1, 1985

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INTRODUCTION/SUMMARY OF THE ARGUMENT

This case presents a challenge to deeply-rooted stereotypes and prejudices about retarded people. As was the case for blacks and women in Plessy v. Ferguson 163 U.S. 537 (1896) and Bradwell v. State, 16 Wall 130 (1873), the "self-evident" characteristics of mentally retarded people are being used by the city of Cleburn to justify exclusion and second-class citizenship.

In Plessy, the "nature of things" made it wholly implausible that the Fourteenth Amendment was intended to "abolish distinctions based on color" or "to enforce social ...equality, or a commingling of the two races upon terms unsatisfactory to either." 163 U.S. at 544 (emphasis added). In Bradwell it was the

"natural and proper timidity and delicacy which belongs to the female sex" which made the "idea of a woman adopting a distinct and independent career from that of her husband" "repugnant." 16 Wall at 141 (Bradley, J., concurring) (emphasis added). Fortunately, these opinions and their sex and race biased underpinning have been discredited. What was considered "self-evident" then about racial minorities and women is now generally considered deplorable. This Court has played a critical role in this evolution. It is this history and its recurrent present day manifestations which compel this Court to continue to scrutinize legislative classifications based on race or gender.

This case presents for the first time the proper role of the Court in reviewing classifications based on mental retardation. The history and present day status of

mentally retarded persons compels this Court to once again question the "self-evident". As the facts of this case demonstrate, to do otherwise would be to sanction the continuation of historical, deeply-rooted stereotypes and prejudices about retarded people. In Cleburn, Texas the "nature of things" is that people cannot live in the community because they are mentally retarded.

The facts of this case and the invalidity of the prevailing stereotypes utilized by the Cleburn City Council are fully addressed by respondent and other Amici. Likewise, the criteria set forth by this Court in United States v. Carolene Products, 304 U.S. 144, 152-53 n. 4 (1938) and San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 28 (1973) are shown to be present. The limited purpose of this brief is to raise suspicion about classifications based on retardation by

demonstrating the close historical interrelationship between demeaning and false stereotypes about retardation and racial prejudice.

Historically, retarded people have been considered sub-human. This characterization has been used to justify "unfair and often grotesque mistreatment," Cleburn Living Center v. City of Cleburne, 726 F.2d 191, 197 (1984). Critical to this justification is the assumption that the "sub-human" does not have the same feelings and reactions to the mistreatment as the "rest of us". Goffman, Stigma 5 (1963); U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 81 (1983). Since retarded people are different from "the rest of us" in an identifiable way, stereotypes and prejudices are easily established and rarely questioned, particularly when

reinforced by "scientific" knowledge. Similar rationale has formed the foundation for racist ideology.

At the turn of the century in the United States the eugenics movement gained prominence in social, scientific and political thought. It was considered to be scientific fact that retardation was genetic, that is caused degeneracy, poverty and crime and that mentally retarded people were exceedingly sexual and needed to be segregated for life. These stereotypes were similar to prevailing stereotypes about blacks. Attributing the label of retardation to blacks provided a scientific shroud of respectability to existing prejudice and served to further justify unequal treatment. Likewise, when the influx of eastern Europeans became a political concern, the "discovery" that they were "feeble-minded" provided a scientific rationale for

exclusionary immigration policies.

It is painful to recount this period in American history. It is recounted here in order to show the abuse of classifications based on retardation and the deep historical roots of current day prejudice. The advances in the rights of retarded persons, set forth in the Government's brief, have not yet succeeded in transforming the public consciousness. To wait for this evolution is to needlessly condemn millions of retarded citizens to continued mistreatment. The neighbors in Cleburn petitioned the City Council to deny the permit in this case. They were fearful, but their fears were unfounded. Their action and that of the City Council represent the gap between public consciousness and current knowledge about retardation. It is precisely these times in history when the protective role of the Court is most important.

This case represents a cross-road in the history of millions of retarded citizens. The legacy of Plessy and Bradwell and the history recounted herein compels this Court to question the "self-evident" and to refuse to tolerate and perpetuate the remnants of this disgraceful era.

ARGUMENT

Prejudice Toward Retarded Persons is Similar to and Historically Interrelated with Racial Prejudice

At the turn of this century, the eugenics movement played a critical role in the development of public policy and public consciousness. Primary to the ideology of the eugenics movement was the belief that retardation was genetic and that the "feeble-minded" were the cause of societal instability. To insure against contamination of the general society, the leaders of this movement, prestigious psychologists and politicians, proclaimed the need for segregation for life and sterilization. With this fear and prejudice about mentally retarded persons firmly embedded in the public consciousness, the label of retardation provided a powerful weapon for racists. Through the "new science" of mental

testing, the scientists were able to "prove" the high rate of retardation among racial and ethnic minorities. Since the "feeble-minded" were seen as sub-human, attributing this characteristic to minorities served to affirm their fundamental difference as well. Hence, the mentally retarded label was used as yet another rationalization for mistreatment.

The original intelligence test was developed in France by Alfred Binet in 1905. Dr. Binet developed the tool as a diagnostic instrument and warned against the "brutal pessimism" of those who would use it as an indicator of innate intelligence.[2] However, the major translators of the Binet test in the U.S., Lewis Terman of Stanford, Henry Goddard at the Vineland Training School of New Jersey, and Robert Yerkes of Harvard,

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[2]Kamin, The Science and Politics of I.Q. 5 (1974); citing A. Binet, Les Ildees modernes sur les enfants, 140-141 (1913).

were all members of various eugenic societies and organizations. From the time of the introduction of the Americanized "Stanford-Binet" test by Terman in 1916, the intermingling of stereotypes about racial minorities and the "feeble-minded" was predominent[3]. In his 1916 publication, The Measurement of Intelligence, 6-7, Dr. Terman made his purpose explicit:

> ...in the near future intelligence tests will bring tens of thousands of these high-grade defectives under the surveillance

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[3]It is important to note at the outset that although the I.Q. test played a particularly pernicious role in the history recounted herein, it is not the I.Q. test per se which is the focus of this examination. Rather, it is the fact that the stigma of retardation was applied to already stimatized groups that is significant here. The virulent use of the label to racial and ethnic minorities demonstrates racial prejudice. Likewise, the fact that it was considered such an effective tool by racists demonstrates the stigma attached to retardation. Sub-human status is the common theme.

> and protection of society. This will ultimately result in curtailing the reproduction of feeble- mindedness and in the elimination of an enormous amount of crime, pauperism, and industrial inefficiency. It is hardly necessary to emphasize that the high-grade cases, of the type now so frequently overlooked, are precisely the ones whose guardianship it is most important for the State to assume.

In Terman's view "high- grade defectives" were:

> very, very common among Spanish-Indian and Mexican families of the Southwest and also among negroes. Their dullness seems to be racial, or at least inherent in the family stocks from which they come.
>
> Children of this group should be segregated in special classes...There is no possibility at present of convincing society that they should not be allowed to reproduce, although from a eugenic point of view they constitute a grave problem because of their unusually prolific breeding. Id. at 91-92.[4]

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[4]Just eleven years later the U.S.

In 1917, Terman wrote, under the heading "The Menace of Feeble-Mindedness";

> only recently have we begun to recognize how serious a menace it is to the social, economic and moral welfare of the state....It is responsible...for the majority of cases of chronic and semi-chronic pauperism....
>
> ...the feeble-minded continue to multiply...organized charities...often contribute to the survival of individuals who would otherwise not be able to live and reproduce...
>
> If we would preserve our state for a class of people worthy to possess it, we must prevent, as far as possible, the propagation of

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Supreme Court upheld the Virginia sterilization law in Buck v. Bell, 271 U.S. 200 (1927). A recent study has revealed that not only was Carrie Buck, the woman who was sterilized, not mentally retarded, but her daughter prior to sterilization was also not retarded. Rather, Carrie Buck was poor and illegitimate, as was her daughter. Justice Holme's infamous statement about "three generations of imbeciles are enough," Id. at 207, was unfounded. Gould, Carrier Buck's Daughter, 93 Natural History 14-18 (July, 1984).

> mental degenerates...curtailing the increasing spawn of degeneracy.[5]

The expediency of using the public fear and prejudice about retarded people to subjugate racial and ethnic minorities is also evident in the politics of immigration at the turn of the century. The wave of immigration from eastern Europe aroused a public clamor for some form of "quality control" over the inflow of immigrants.[6] The new "science" of mental testing was used to reinforce existing prejudices.

In 1912, Henry Goddard was invited by the U.S. Public Health Service to Ellis Island to determine the extent of the "feeble- minded menace" among the new immigrants. The test results established that 83% of the Jews, 80% of the Hungarians,

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[5]L. M. Terman, Feeble-Minded Children in The Public Schools of California, 5 Schools and Society, 165 (1917).

[6]Kamin, supra, at 16.

79% of the Italians, and 87% of the Russians were "feeble-minded." H. H. Goddard, The Binet Tests in Relation to Immigration, Journal of Psycho-Asthenics, (1913).

The eugenics "scientists" became increasingly involved in politics during the early formulation of immigration policies in the 1920's. The secretary of the Eugenics Research Association, Harry Laughlin, was appointed "Expert Eugenics Agent" of the House Committee on Immigration and Naturalization of the U.S. Congress. The chairman of the Eugenics Research Association was also the chairman of the House Committee on Immigration and Naturalization, Albert Johnson.[7]

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[7]Kamin, supra, at 19. The eugenics philosophy was also voiced by other prominent political figures. For example, Vice President Coolidge wrote in 1922 that the laws of biology had demonstrated that Nordic people deteriorate when mixed with other races. Kluger, Simple Justice 307 (1976).

The National Research Council established a Committee on Scientific Problems of Human Migration, under the leadership of Robert Yerkes[8], to provide "scientific" information to Congress on the innate characteristics of classes of immigrants. In the first research of the National Research Council's committee, by Professor Brigham of Princeton, a new scientific discovery was unveiled. The intelligence of immigrants was related to the number of years that they had lived in America. Those who had lived in the country for five years or less were essentially feeble-minded. From this its author concluded that "we are forced to...accept the

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[8]Yerkes led a major testing study of draftees during World War I. The results which were published by the National Academy of Sciences under Yerkes editorship first announced the inferior intelligence of blacks, along with immigrants from Latin or Slavic countries. Kamin, supra, at 18-19.

hypothesis that the curve indicates a gradual deterioration in the class of immigrants...who came to this country in each succeeding five year period since 1902."[9] From this Professor Brigham provides a clarifying explanation--"the race hypothesis."

> The Nordics are...rulers, organizers, and aristocrats...individualistic, self-reliant, and jealous of their personal freedom...as a result they are usually Protestants....The Alpine race is always and everywhere a race of peasants....The Alpine is the perfect slave, the ideal serf...the unstable temperament and the lack of coordinating and reasoning power so often found among the Irish....we have no separate intelligence distribution for the Jews....our army sample of immigrants from Russia is at least one half Jewish....Our figures, then, would rather tend to disprove the popular belief that the Jew is intelligent...he has the head form, stature, and color of his Slavic neighbors. He is an Alpine Slav.

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[9] Id. at 21.

C. Brigham, A Study of American Intelligence, 182-3, 195, 189, 190 (1923).

Finally, Dr. Brigham warned:

> We must face a possibility of racial admixture here that is infinitely worse than that faced by any European country today, for we are incorporating the negro into our racial stock, while all of Europe is comparatively free from this taint....The decline of American intelligence will be more rapid than the decline of the intelligence of European national groups, owing to the presence here of the negro. Id. at 210.[10]

The critical role of the eugenics movement continued throughout the Congressional hearings leading up to the

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[10]Lest it be assumed that Professor Brigham's work was disavowed by his colleagues, the 1923 Journal of Educational Psychology stated "The thesis is carefully worked up...we certainly shall be in hearty agreement with him when he demands a more selective policy for future immigration and a more vigorous method of dealing with the defective strains already in this country." Kamin at 22 citing, 4 Journal of Educational Psychology 184-185 (1923).

Immigration Act of 1924.[11] It is no coincidence that during this same period of time anti-black feeling in America was at its zenith and that the findings of the "scientists" that blacks were more likely to be "feeble-minded" was also used to justify racial segregation.[12]

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[11] Hearings before the Committee on Immigration and Naturalization, House of Representatives, January 3, 4, 5, 22, and 24, 1923 at 589-594; Hearings before the Committee on Immigration and Naturalization, House of Representatives, December 26, 27, and 31, 1923, and January 2, 3, 4, 5, 7, 8, 10 and 19, 1924, at 837; Hearings before the Committee on Immigration and Naturalization, House of Representatives, March 8, 1924, at 1231-1284. See also, Kamin, supra at 19-26. "The Johnson-Lodge Immigration Act of 1924 established national origin quotas as a permanent aspect of immigration policy...; but most important, the quotas were to be based on the census of 1890. The use of the 1890 census had only one purpose.... The "New Immigration" had begun after 1890, and the law was designed to exclude the biologically inferior...." Id. at 27.

[12] See generally, Kluger, Simple Justice 306-314 (1976).

The dramatic overrepresentation of blacks in classes for the mentally retarded

The fervor of the reaction to the "findings" of the high rate of retardation in the non-Nordic races was fueled by and dependant on the assumption throughout that the "feeble-minded" were less than fully human and were the primary cause of society's ills--pauperism, crime, sex offenses and dependency.

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also testifies to the continuing influence of this era on the present day status of minorities. Office of Civil Rights, Department of Education, Elementary and Secondary School Civil Rights Survey (1980). As stated by Judge Peckam in Larry P. v. Riles, 495 F. Supp. 926,935 (1979):

> We must recognize at the outset that the history of the I.Q. test, and of [segregated] education classes built on I.Q. testing, is not the history of neutral scientific discoveries translated into educational reform. It is, at least in the early years, a history of racial prejudice, of Social Darwinism, and of the use of the scientific "mystique" to legitimate such prejudices.

CONCLUSION

The underpinnings of the eugenic influenced immigration policies, the officially sanctioned segregation of Plessy v. Ferguson and the segregation and sterilization of the mentally retarded are closely related. Each is reliant on public stereotypes, reinforced by sociological and scientific trends, and each has as its objective the maintenance of majoritarian power and prestige, at the expense of the minority. Perhaps most alarming is the fact that each stereotype is considered "self-evident" at the time.

As stated by Richard Kluger in Simple Justice 305 (1976):

> ....Had the Plessy Court chosen candidly to declare the prevailing view of the day among white Americans of every station, it would have said that no badge was necessary to proclaim what was self-evident. Keeping blacks

> separate, everyone understood, would prevent contamination of white blood by the defective genes of colored people, whose unfortunate traits stemmed from their tribal origins in densest Africa and were incurably fixed upon the race from generation unto generation. Why speak of "badges of inferiority" when their very blackness bespoke their low and brutish nature?

The intermingling of stereotypes about racial and ethnic minorities and those about the mentally retarded compels the need to scrutinize classifications on the basis of mental retardation. The lesson is clear that prevailing attitudes reflected in legislative choices cannot be given deference in light of this history. If nothing else, at least we have demonstrated that "self-evident" truths about historically despised people must be questioned. The scrutinizing role of the judiciary is critical to preserve the fundamental principles of equality and justice.

For the foregoing reasons, Amicus respectfully submits that the Court should affirm the decision below.

Respectfully submitted,

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